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SJC-12878

COMMONWEALTH vs. INDIAH BOGER.

Essex. September 10, 2020. - December 10, 2020.

Present: Lenk, Gaziano, Budd, Cypher, & Kafker, JJ.¹

Controlled Substances. Parks and Parkways. Municipal Corporations, Parks. Words, "Public."

Complaint received and sworn to in the Salem Division of the District Court Department on August 10, 2016.

The case was tried before Randy S. Chapman, J.

The Supreme Judicial Court granted an application for direct appellate review.

Nicholas Matteson for the defendant.
Emily R. Mello, Assistant District Attorney, for the Commonwealth.

BUDD, J. The defendant, Indiah Boger, was convicted of distribution of cocaine in violation of G. L. c. 94C, § 32A (a), and of committing the crime within one hundred feet of a public

¹ Justice Lenk participated in the deliberation on this case prior to her retirement.

park in violation of G. L. c. 94C, § 32J (§ 32J), in connection with a sale of the controlled substance to an undercover officer. The defendant appeals from the latter conviction, arguing that the Commonwealth provided insufficient evidence that the park at issue was "public" within the meaning of § 32J. We allowed the defendant's application for direct appellate review and conclude that, because the Commonwealth did not demonstrate that the area in question was either owned or maintained by a governmental entity, it failed to prove that the area in question is a "public park" for the purposes of the statute. We therefore vacate the conviction of a violation of § 32J.

Background. We summarize the facts the jury could have found, reserving some details for later discussion. As part of a "sting" operation, a Manchester-by-the-Sea police detective posted a listing on Craigslist² stating that he was "[l]ooking to SKI . . . in the woods up school st." The detective testified at trial that "ski" is a slang term for cocaine. Thereafter, the detective received an e-mail response asking if he was "looking for ski." The detective responded that he was interested, and the communication continued by way of text messaging, through which the parties settled on a price and quantity of cocaine for purchase.

² Craigslist is a classified advertisements website.

The detective asked the seller to meet him in a parking lot close to the highway in Manchester-by-the-Sea and provided directions. Sometime later, the defendant arrived in a vehicle at the predetermined location with two other individuals. The detective approached the passenger side of the vehicle and handed money to the front seat passenger. The defendant, who was sitting behind the front seat passenger, then handed the detective a plastic bag containing white powder, later determined to be cocaine. After leaving the parking lot, the vehicle was stopped by police officers working with the detective, and all three individuals were arrested.³

The location of the drug transaction was a parking lot for the Cathedral of the Pines, a recreation area, consisting of several thousand acres, that is open to the public. Although there was testimony that some of the land within the Cathedral of the Pines was owned by the towns of Manchester-by-the-Sea and Essex, no evidence was presented as to where the government-owned tracts were located.

The defendant was convicted on both counts and sentenced to one day of imprisonment for the distribution offense and two

³ The other two individuals were charged and tried as codefendants. One codefendant was found guilty of cocaine distribution and of violating G. L. c. 94C, § 32J, and the other was acquitted on both charges.

years of imprisonment for the § 32J offense, to be served consecutively.

Discussion. Section 32J provides in relevant part: "Any person who violates the provisions of [G. L. c. 94C, §§ 32, 32A, 32B, 32C, 32D, 32E, 32F, or 32I,] . . . within [one hundred] feet of a public park or playground . . . shall be punished by a term of imprisonment" G. L. c. 94C, § 32J. Although the defendant does not contest the jury's finding that she was involved in a drug transaction adjacent to a park, she argues that the Commonwealth failed to prove that Cathedral of the Pines is a public park as required by the statute. More specifically, the defendant contends that to be a "public park" within the meaning of § 32J, the property must not only be open to the public, but also be either owned or maintained by a governmental entity. We agree.

1. The meaning of "public" within the context of § 32J. In Commonwealth v. Matta, 483 Mass. 357 (2019), we considered the meaning of "park" under § 32J. There we cited with approval the dictionary definition, which described a "park" as "a tract of land maintained by a city or town as a place of beauty or of public recreation" (emphasis added). Id. at 372, quoting Webster's Third New International Dictionary 1642 (1993). We further stated that it "is for the jury to decide whether a tract of land is publicly owned or maintained and dedicated for

enjoyment and recreational use by the public." Matta, supra at 373. Although these descriptions of a "park" included aspects that would also make the area "public," in that case there was no dispute whether the area in question was "public." Thus, our inquiry was focused on, and was limited to, the meaning of "park" under the statute. Id. at 372. We now turn to the question of the Legislature's intent in placing the adjective "public" before the word "park." See Casseus v. Eastern Bus Co., 478 Mass. 786, 795 (2018) ("Our primary goal in interpreting a statute is to effectuate the intent of the Legislature" [citation omitted]).

Just as § 32J does not define the term "park," it similarly does not define its modifier, "public." We thus begin with the ordinary meaning of the word. See Matta, 483 Mass. at 372, quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). The definition of "public" includes the concept of "relating to, or affecting the people as an organized community," as well as that of being "authorized or administered by or acting for the people as a political entity." See Webster's Third New International Dictionary 1836. However, where "public" is used as a modifier, it typically denotes governmental ownership or control. See, e.g., id. (defining "public corporation" as one that is "government-owned"); id. (defining "public housing" as "low-rent housing owned,

sponsored, or administered by a government"); id. (defining "public land" as "land owned by a government").

Interpreting the word "public" when used as an adjective as government-owned or controlled is consistent with our use of the term "public park" in other legal contexts. See, e.g., Codex Corp. v. Metropolitan Dist. Comm'n, 392 Mass. 245, 250 (1984) ("The Legislature first provided for municipal public parks by St. 1882, c. 154, 'An Act authorizing towns and cities to lay out public parks within their limits' . . ."); Salem v. Attorney Gen., 344 Mass. 626, 627 (1962) ("public park" at issue in city's "custody and control"); Lowell v. Boston, 322 Mass. 709, 735, appeal dismissed sub nom. Pierce v. Boston, 335 U.S. 849 (1948) ("It is settled that the ownership in and the management by the city of a public park . . . is subject to the paramount control of the [Legislature]"); Catanzarite v. Springfield, 32 Mass. App. Ct. 967, 967 (1992) (describing Forest Park as "a free public park and recreational area maintained by the city of Springfield"). See also Smith v. Westfield, 478 Mass. 49, 50 (2017) ("A city or town dedicates land as a public park where there is a clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park").

The Commonwealth contends, however, that a park need not be owned or maintained by a governmental entity to be deemed a

public park under § 32J. Rather, in its view, government ownership and maintenance are merely factors that a jury may consider in determining whether a tract of land is a public park pursuant to the statute. In essence, the Commonwealth's position is that a jury could find that privately owned land that is accessible to the public for recreation or enjoyment may qualify as a "public park" under § 32J. We are not persuaded.

First, "[i]t is a well-established proposition that criminal statutes are to be construed narrowly." Commonwealth v. Pagan, 445 Mass. 161, 167 (2005), quoting Commonwealth v. Kerr, 409 Mass. 284, 286 (1991). The Commonwealth's broad interpretation of what constitutes a public park under § 32J would make the statute applicable to a greater number of spaces than if the area in question were required to be owned or maintained by the government, thereby exposing a greater number of defendants to enhanced penalties.

Limiting the meaning of "public park" under § 32J to land owned or maintained by a governmental entity is consistent with legislative intent. Although there is no question that the purpose of the statute is "to protect children from the harmful impact of drug dealing," Commonwealth v. Peterson, 476 Mass. 163, 168 (2017), in 2012, twenty-three years after the statute was first enacted, the Legislature amended the statute to reduce the disparate impact it had on minority communities in urban

areas in its original form, id. at 168-169. See St. 2012, c. 192, §§ 30, 31 (amending § 32J to reduce school zone radius from 1,000 feet to 300 feet and limiting time period for offense to between 5 A.M. and midnight). Reading the statute broadly to include privately owned public spaces likely would lead to a similar unintended impact on those who live in urban areas. See Schindler, The "Publicization" of Private Space, 103 Iowa L. Rev. 1093, 1114-1115 (2018) (proliferation of privately owned spaces such as plazas, patios, and parks that are required to be publicly accessible by municipal ordinances and planning codes).

Further, the meaning that the Commonwealth seeks to attribute to "public park" under § 32J is, in essence, the same meaning that we previously attributed to "park" unmodified by "public"; i.e., a tract of land that is both set apart for, and open to, the public for recreational use. Matta, 483 Mass. at 373. As the Commonwealth's interpretation renders the word "public" superfluous, we are unpersuaded that it is the correct one. See Commonwealth v. Disler, 451 Mass. 216, 227 (2008), quoting Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 358 (1977) ("'every word in a statute should be given meaning,' . . . and no word is considered superfluous").

We conclude instead that, by placing the modifier "public" before the term "park" in § 32J, the Legislature intended that a

public park under the statute is a tract of land that is (1) set apart or dedicated for public enjoyment or recreational use, and (2) owned or maintained by a governmental entity. See Matta, 483 Mass. at 373.

2. Sufficiency of the evidence. The defendant argues that the judge erred by denying her motion for a required finding of not guilty on the § 32J charge because the Commonwealth failed to demonstrate that she committed a drug crime within one hundred feet of a public park. To determine whether the Commonwealth met its burden of proof to establish each element of the offense charged, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Here, the detective involved in the undercover operation testified that the drug transaction in which the defendant took part occurred within one hundred feet of the recreation area; however, there was no evidence that the defendant was within one hundred feet of an area owned or maintained by a governmental entity.⁴ The § 32J conviction therefore cannot stand.

⁴ Although there was testimony that some of the land comprising the area was "town-owned land," no evidence was presented as to which tracts within the several thousand acres

Conclusion. The judgment of conviction on the count charging the defendant with the § 32J violation is vacated, the jury verdict on that charge is set aside, and judgment shall enter for the defendant.⁵

So ordered.

of land were owned or maintained by governmental entities. Nothing in the record demonstrated that the area within one hundred feet of the drug transaction was owned or maintained by a governmental entity, and the Commonwealth did not call as a witness any government official involved in the maintenance of the surrounding area.

⁵ Given the result we reach, we need not address the defendant's argument that she was entitled to present an entrapment defense where the undercover officer chose the location for the transaction.